IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

AS.No. 576 of 1992(A) & CROSS OBJECTION

OS.92/1988 OF ADDL.SUB COURT, THALASSERY.
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APPELLANTS/ DEFENDANTS 12 & 24:
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1. **A.M. PADMINI AMMA, D/O. KRISHNAN NAMBIAR, OLACHERI HOUSE, POST CHALAD, CANNANORE.**

2. **A.M. SATHYABHAMA, D/O. KUNHIKANNAN NAMBIAR, C/O. T.L. NAMBIAR, 125, SHIVAJI NAGAR, NAGPUR.**

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.),
ADV. SMT.PRABHA R.MENON,
ADV. SRI.M.KRISHNAKUMAR,

RESPONDENTS/ APPELLANTS & DEFENDANTS 1 TO 11, 13 TO 23 & 25 TO 18:
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1. **VIJAYALAKSHMI AMMA, D/O. AMMUKUTY AMMA, RESIDING AT VANAMALI VIHAR, POST WEST PONNIAM, KADIRUR, TELLICHERY.**

2. **V.P. MURALEEDHARAN, S/O. VIJAYALAKSHMI AMMA, RESIDING AT VANAMALI VIHAR, POST WEST PONNIAM, KADIRUR, THALASSERY.**

3. **V.P. VANAJA, D/O. VIJAYALAKSHMI AMMA, RESIDING AT NEW DELHI.**

4. **V.P. MADHUSUDHANAN, S/O. VIJAYALAKSHMI AMMA, MECHANIC, NOW RESIDING AT NEW DELHI.**

5. **V.P. VINEETHA, D/O. VIJAYALAKSHMI AMMA, RESIDING AT VIJAYA NIVAS, WEST PONNIAM POST.**

A.S. NO. 576/1992:

6. V.P. ANOOP, S/O. VANAJA, AGED 17 (MINOR), THROUGH THE NEXT FRIEND MOTHER VANAJA 3RD RESPONDENT.

7. V.P. BHARATH KUMAR, ALIAS B.K. NAMBIAR, S/O. AMMUKUTTY AMMA, MEDICAL SUPERVISOR, RESIDING AT MADRAS.

***8. V.P. AMMUJAM, D/O. AMMUKUTTY AMMA, RESIDING AT BOMBAY. *(DIED).**

***IT IS RECORDED THAT R.8 IS DEAD AND THAT R.9 TO R.11 ARE HER LEGAL HEIRS - VIDE ORDER DATED 04/10/06 ON I.A. 3803/05.**

9. P.V. DINESH NAMBIAR, S/O. V.P. AMMUJAM, DOCTOR, NOW RESIDING AT BOMBAY.

10. V.P. LATHA MENON, D/O. AMMUJAM, RESIDING AT U.S.A.

11. V.P. SURESH NAMBIAR, S/O. AMMUJAM, ACCOUNTANT, NOW RESIDING AT U.S.A.

12. V.P. PADMAJAVALLY, D/O. AMMUKUTY AMMA. RESIDING AT KUWAIT.

13. V.P. SHIBANI, D/O. PADMAJAVALLY, NOW RESIDING AT MADRAS.

14. V.P. AJAY NAMBIAR, S/O. PADMAJAVALLI, NOW RESIDING AT KUWAIT.

15. V.P. MALLIKA RANI, D/O. AMMUKUTY AMMA, NOW RESIDING AT MADRAS.

16. V.P. SANGEETHA, D/O. MALLIKA RANI, NOW RESIDING AT MADRAS.

17. V.P. SANJAY, S/O. MALLIKA RANI.

18. V.P. RADHAKRISHNAN, S/O. AMMUKUTTY AMMA, STOREKEEPER, NOW RESIDING AT KUWAIT.

RESPONDENTS 3, 4, 6, 7, 13, 15, 16 AND 17 ARE REPRESENTED BY POWER OF ATTORNEY HOLDER MR. V.P. MURALEEDHARAN, S/O. VIJAYALAKSHMI AMMA, RESIDING AT VANAMALI VIHAR, POST WEST PONNIAM, TELLICHERRY - 2ND RESPONDENT.

RESPONDENTS 8, 9, 10 AND 11 ARE REPRESENTED BY POWER OF ATTORNEY HOLDER MR. K.N. MADHAVAN NAMBIAR, OTHAYOTH HOUSE, POST BRUVATTY, (VIA) KADIRUR.

A.S. NO. 576/1992:

RESPONDENTS 12, 14, AND 18 ARE REPRESENTED BY POWER OF ATTORNEY HOLDER MR. K.T. SREEKUMAR, VIJAYA NIVAS, POST WEST PONNIAM.

****19. V.P. KUNHIKANNAN NAMBIAR, S/O. PARVATHY AMMA, OLACHERI HOUSE, POST CHALAD, CANNANORE (DIED).**

****THE IMPLEADING OF THE FIRST APPELLANT AS THE SOLE LEGAL HEIR OF DECEASED V.P. KUNHIKANNAN NAMBIAR (19TH RESPT.) IS RECORDED SUBJECT TO THE RIGHT OF THE CONTESTING RESPONDENTS TO ARGUE WHEN THE APPEAL IS HEARD THAT ALL THE LEGAL REPRESENTATIVES HAVE NOT BEEN IMPLEADED - VIDE ORDER DATED 24/08/95 IN C.M.P. NO. 2496/95.**

#20. V.P. SATHYAPALAN, S/O. AMMUKUTTY AMMA, PLEADER, RESIDING AT LAKSHMI NIVAS, KAVANISSERI, POST CHERUKUNNU (VIA) CANNANORE. (DIED).

21. V.P. SAILENDRANATH, S/O. AMMYKUTY AMMA, AGED 47, MEDICAL REPRESENTATIVE RESIDING AT `SUPRIYA', POST KALOOR, COCHIN - 17.

22. A.C. KALLIANIKUTTY AMMA, W/O. MADHAVAN NAMBIAR, RESIDING AT `DWARAKA' POST BRUVATTY (VIA) KADIRUR.

23. A.C. JALAJA, D/O. KALLIANIKUTY AMMA, C/O. N. NARAYANAN NAIR, PERSONNEL ASSISTANT, HEAD POST OFFICE, BADAGARA.

24. P.K. RUGMINI AMMA, W/O. GOVINDANKUTTY NAMBIAR, RESIDING AT GOKULAM POST, KADIRUR.

25. P.K. GIRIJA, D/O. GOVINDANKUTTY NAMBIAR, RESIDING AT GOKULAM, POST KADIRUR.

26. P.K. GOPINATH, S/O. GOVINDANKUTTY NAMBIAR, RESIDING AT GOKULAM, POST KADIRUR.

27. A.M. LAKSHMYKUTTY AMMA, D/O. KRISHNAN NAMBIAR, RESIDING AT VIMALA SADAN, KUNHIMANGALAM (VIA), KANNUR.

#28. A.M. RAGHAVAN NAMBIAR, S/O. KRISHNAN NAMBIAR, RESIDING AT DOOR NO. 20, DELHOUSY COLONY, NEW DELHI - 12.

A.S. NO. 576/1992:

29. A.M. PADMANABHAN NAMBIAR, S/O. KRISHNAN NAMBIAR, RETD. MECHANIC, 202, AIR INDIA HOUSING COLONY (DIED).

30. A.M. CHANDRAMATHI AMMA, D/O. KRISHNAN NAMBIAR, RESIDING AT VIMALA SADAN, POST KUNNIMANGALAM.

31. A.M. RAVINDRAN NAMBIAR, S/O. KRISHNAN NAMBIAR, P.B. NO. 341, KUWAIT, ARABIAN GULF - (DIED)

32. A.M. AMMUJAM, D/O. KRISHNAN NAMBIAR, RESIDING AT C-21/186, GANDHI NAGAR, BANDRA EAST, BOMBAY -51.

33. A.C. MADHAVI AMMA, D/O. NARAYANAN NAMBIAR, RESIDING AT KELOTH HOUSE, POST ERUVATY, KADIRUR.

34. A.C. KALLIANIKUTTY AMMA, D/O. NARAYANAN NAMBIAR, RESIDING AT `DWARAKA', POST ERAVATTY, KADIRUR (STRUCK OFF)

35. A.C. MEENAKSHIKUTTY AMMA, D/O. NARAYANAN NAMBIAR, `SREENILAYAM', BEHIND THE CHAMBER OF COMMERCE, THAZHETHORU, CANNANORE -2.

36. A.C. LAKSHMIKUTTY AMMA @ CHINNAMMA AMMA, D/O. NARAYANAN NAMBIAR, RESIDING AT RAJAPURAM, ERUVATTY.

37. A.C. SAVITHRI AMMA, D/O. NARAYANAN NAMBIAR, KELOTH HOUSE, POST ERUVATTY.

38. A.C. PADMINI AMMA, D/O. NARAYANAN NAMBIAR, KELOTH HOUSE, POST ERUVATTY.

39. A.C. BALANARAYANAN NAMBIAR, S/O. NARAYANAN NAMBIAR, RETD. TEACHER, RESIDING AT KELOTH HOUSE, POST ERUVATTY.

40. A.C. MADHAVANKUTTY, S/O. NARAYANAN NAMBIAR, RESIDING AT `DWARAKA' POST ERUVATTY.

41. A.M. RATHI, D/O. KUNHIKANNAN NAMBIAR, OLACHERI HOUSE, CHALAD AMSOM, CANNANORE.

@ 42. P.K. GEETHA, D/O. P.N.N. NAMBIAR, EMPLOYED IN STATE BANK OF INDIA, CANNANORE, RESIDING AT PAYYAMBALAM, CANNANORE. (STRUCK OFF)

A.S. NO. 576/1992:

43. O. RADHAKRISHNAN, S/O. C.K. MENON, BANK EMPLOYEE, RESIDING AT JAYANTHI ROAD, CHALAT, SREENIVAS, CANNANORE.

44. P. VIJAYAN, JOINT ACCOUNTS OFFICER, TELEPHONES, CANNANORE.

45. K. RAMACHANDRAN, OFFICE OF THE DISTRICT MANAGER, TELEPHONES, CANNANORE.

46. P. JANAKI, W/O. RAVINDRAN, RESIDING AT JAWAHAR HOUSING COLONY, POST THOTTADA, CANNANORE.

47. P. SOBHANA, D/O. RAVINDRAN, RESIDING AT JAWAHAR HOUSING COLONY, POST THOTTADA, CANNANORE.

48. P. PRADEEP, S/O. RAVINDRAN, CLERK, JAWAHAR HOUSING COLONY, POST THOTTADA, CANNANORE.

49. P. DILIP, S/O. RAVINDRAN, RESIDING AT JAWAHAR HOUSING COLONY, POST THOTTADA, CANNANORE.

50. A.M. SATHYANATHAN, S/O. KUNHIKANNAN NAMBIAR, RESIDING AT OLACHERI HOUSE, CHALAD, CANNANORE.

51. T. SAROJA, W/O. A.M. PADMANABHAN NAMBIAR, RESIDING AT VIJAYASREE DURGA HOUSING SOCIETY, BLOCK NO. 34, 6TH ROAD SANTACRUZ EAST, BOMBAY-55.

52. T. ANOOP, CLERK, RESIDING AT VIJAYASREE DURGA HOUSING SOCIETY, BLOCK NO. 34, 6TH ROAD, SANTACRUZ EAST, BOMBAY-55.

53. T. ANIL, CLERK, RESIDING AT VIJAYASREE DURGA HOUSING SOCIETY, BLOCK NO. 34, 6TH ROAD, SANTACRUZ EAST, BOMBAY - 55.

54. T. ASHA, RESIDING AT VIJAYASREE DURGA HOUSING SOCIETY, BLOCK NO. 34, 6TH ROAD, SANTACRUZ, EAST BOMBAY-55.

A.S. NO. 576/1992:

#ADDL. R. 55 TO 57 AND R.58 TO 62 IMPLEADED:

**55. MRS. T. VINODINI, W/O. LATE V.P. SATHYAPALAN,
RESIDING AT `LAKSHMI NIVAS, KAVINISSERY,
POST CHERUKUNNU, KANNUR DISTRICT.**

56. T. JAYASREE, D/O. LATE DO- DO- DO-

57. T. JAYAPRAKASAN, S/O. LATE DO- DO-

 # LEGAL HEIRS OF THE DECEASED R.20 ARE IMPLEADED AS ADDL.R55 TO 57 - VIDE ORDER DATED 18/01/05 ON C.M.P. NO. 3870/97.

**58. BEENA MOKERJI, D/O. LATE RAGHAVAN NAMBIAR,
FLAT NO. 23, JAWAHAR BAUH, 108, UIU SONS HILL, NORVURY,
LONDON, SW 163, EU.**

**59. ASHA BALAGOPALAN, D/O. LATE RAGHAVAN NAMBIAR,
94/F, POCKET NO. 4, PHASE I, MAYUR VIBOR, NEW DELHI.**

**60. SUNILKUMAR, S/O. LATE RAGHAVAN NAMBIAR,
QUARTER NO. 499, SECTOR NO. 8, R.K. PURAM,
NEW DELHI - 22.**

**61. GEETHA VIJAYAN, D/O. LATE RAGHAVAN NAMBIAR,
KAMALALAYAM, , EDAT POST, PAYYANNUR, KANNUR.**

**62. PUSHPA SASIDHARAN, D/O. LATE RAGHAVAN NAMBIAR,
PODOTH HOUSE, KUVERI, KANNUR.**

 # LEGAL HEIRS OF THE DECEASED 28TH RESPONDENT ARE IMPLEADED AS ADDL. R.58 TO 62 VIDE ORDER DATED 13/01/05 ON I.A. 1116/03.

**BY ADV. SRI. N. VISWANATHA IYER,
SRI.M.P.ASHOK KUMAR,
SMT.VIDHYA. A.C,
SRI.B.KRISHNAN,
SRI.R.PARTHASARATHY.**

THIS APPEAL SUITS ALONG WITH CROSS OBJECTION HAVING BEEN FINALLY HEARD ON 6/09/2007, THE COURT ON 24/10/2007 DELIVERED THE FOLLOWING:

prv.

ORDER ON C.M.P. NO. 7824/1992 IN A.S. NO. 576/1992

DISMISSED

SD/- KURIAN JOSEPH, JUDGE.

24/10/2007. **SD/- HARUN-UL-RASHID, JUDGE.**

//TRUE COPY//

prv.

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

A.S.No.576 of 1992 & Cross- objections

Dated: October 24, 2007

JUDGMENT

Harun-Ul-Rashid, J.

This Appeal Suit arises from the judgment and decree dated 21.12.1991 in O.S.No.92/1988 on the file of the Sub Court, Thalassery. Defendants Nos.12 and 24 are the appellants herein. The plaintiffs and defendant No.3 have jointly preferred the memorandum of cross-objection challenging the finding of the court below in regard to item No.6 of the plaint schedule property. The parties herein are referred to hereafter as plaintiffs and defendants.

2. O.S.No.92/1988 is a suit for partition praying to pass a preliminary decree for partition of item Nos.1 and 2 in the plaint schedule properties into 25 shares, to allot 18 shares to the plaintiffs and for partition of item Nos.3 to 6 in the plaint schedule properties into 23 shares and to allot 18 such shares to the plaintiffs with the past and future profits and for such other consequential reliefs.

3. The facts necessary for the disposal of the appeal are as follows:-

The plaintiffs and the defendants in the suit are the descendants of the common ancestress Velluva Puthiyaveettil Lakshmi Amma. The A schedule attached to the plaint is the genealogy of the parties. The plaint B schedule are the immovable properties belonging to the plaintiffs and the

defendants. The plaintiffs are some of the children and grandchildren of Ammukutty Amma who is the only daughter of Parvathi Amma. Parvathi Amma is the daughter of the common ancestress Lakshmi Amma. Parvathi Amma died in the year 1964. Ammukutty Amma died in the year 1949. The 1st defendant is the only son alive at the time of filing the suit amongst the children of Parvathi Amma and he was the eldest male member among the tavazhi members who became co-owners as a result of Act 30 of 1976. Till 1976 he was the Karanavan of the tavazhi and as the eldest male member, he was managing the properties.

4. Item Nos.1 and 2 were allotted to Lakshmi Amma and her descendants as per Ext.A1 partition karar dated 13.6.1933 entered into in the family by name Velluva Puthiyaveettil. In item No.1 there is a house in which the 1st defendant and his family members are residing. Item Nos.3, 4 and 5 originally belonged to Arathikandoth Kannan Nambiar and as per Ext.A2 registered will executed by him on 31.8.1924, the said properties were bequeathed to Parvathi Amma and all her children to be enjoyed as tavazhi. Kannan Nambiar died in 1929. Item Nos.3, 4 and 5 were enjoyed as tavazhi properties by Parvathi Amma and her descendants. Item No.6 is the last item of property scheduled as B schedule. Item No.6 was purchased by Parvathi Amma and her children as per Ext.A3 assignment deed dated 9.11.1942. According to the plaintiffs the consideration paid for item No.6 was out of the income from item Nos.3 to 5 which the tavazhi

got by Ext.A2 registered will dated 31.8.1924 and as such item No.6 also belongs to the tavazhi of Parvathi Amma and her descendants. In short, according to the plaintiffs, item Nos.1 and 2 belonged to the larger tavazhi of Lakshmi Amma and item Nos.3 to 6 belonged to the tavazhi of Parvathi Amma. Besides the aforesaid properties, the tavazhi also owned several other items of tenanted properties. The respective tenants purchased the right, title and interest of the tavazhi by separate proceedings before the Land Tribunal. The plaintiffs claim that defendants 1 and 2 had received Rs.20,000/- as purchase money which belongs to the tavazhi. The said amount of Rs.20,000/- is shown as C schedule and they have further claimed their share of the purchase money as well.

5. It is pleaded in the plaint that the plaintiffs now understand that the 1st defendant in collusion with the 2nd defendant had created some false documents to defeat the rights of the plaintiffs, that such documents are not binding on the plaintiffs and neither the 1st defendant nor the 2nd defendant are entitled to any sort of reservation with respect to any portion of items Nos.1 and 2 of the plaint schedule properties. In paragraph 9(b) inserted by way of amendment it is averred that the supplemental 25th defendant had assigned 30 cents of land in item No.1 in favour of supplemental defendants 26 to 29 during the pendency of the suit. Those documents are not binding on the plaintiffs and other members of the tavazhi. In paragraph 9(c) inserted it is further alleged that the gift deed

executed by the 1st defendant in favour of his son who is the supplemental 34th defendant is also a collusive document not binding on other members of the tarwad. In paragraph 10(a) inserted by way of amendment it is also pleaded that the 1st defendant had created some documents with respect to item No.1 in favour of his two daughters who are impleaded as supplemental defendants 24 and 25 in the suit. In paragraph 10(b) of the plaint as inserted, it is further stated that the special right claimed by the 1st defendant on the strength of lease deed in his favour dated 3.8.1960 (Ext.B1) is a fraudulent document not binding on the members of the tarwad, that the lessor is the father-in-law of the 1st defendant and that he had no right to lease the same, that the purchase certificate obtained by the 1st defendant making the 2nd defendant as the respondent is not binding on the tarwad and so also the purchase of items Nos.1 and 2 in the name of the 1st defendant was behind the back of other members of the tarwad and therefore special right claimed by the 1st defendant and others on the basis of the illegal lease and purchase certificate are not valid and binding on the plaintiffs. It is also alleged in paragraph 10(b) that the plaintiffs are entitled to get their share in the property with past and future profits ignoring all the documents put forward by the defendants to which they are not parties.

7. Defendants Nos.1 and 12 filed a joint written statement contending inter alia that the plaint item Nos.1 and 2 exclusively belong to

the 1st defendant, item Nos.1 and 2 are not partible, that plaint item No.1 originally belonged in jenm right to Velluva Puthiyaveettil tarwad, during March 1952 this property was orally leased by the then Karanavan of the tarwad Sri Krishnan Nambiar in favour of the 1st defendant on kuzhikanom right, that subsequently in the year 1960 Krishnan Nambiar executed a kuzhikanom pattadaram in favour of the 1st defendant as per Ext.B1 registered document No.1326/1960, that on the basis of the oral lease and subsequent lease deed (Ext.B1), he obtained purchase certificate in respect of item Nos.1 and 2 as per the proceedings in SM No.30/1983 and thus he was holding the properties on exclusive rights. It is also contended that the 1st defendant is residing in the house in item No.1 with his family members and that he has re-modelled the house therein. It is also alleged in the written statement that he had gifted 46.5 cents of land in favour of his daughter Sathyabhama as per document No.3062/1986 and in 1987 he had assigned 30 cents in favour of his daughter Rathi as per document No.717/1987. In the written statement the defendants have also stated that these defendants have no objection in partitioning item Nos.3 to 6 and they are also entitled to get their share with mesne profits in item Nos.3 to 6. It is also averred that the tenancy of the 1st defendant over item Nos.1 and 2 was admitted by the tarwad of the plaintiffs and the defendants and therefore it is submitted that item Nos.1 and 2 may be excluded from partition and there can be a decree for partition in respect of

the other items. In the additional written statement filed by the same defendants it is further averred that the right of the plaintiffs, if any, over item Nos.1 and 2 is barred by adverse possession and limitation in view of the 1st defendant's exclusive possession and enjoyment of the same. It is also pleaded in the additional written statement that item No.3 has lost its character as tavazhi property by virtue of document No.320 of 1929, that as per the said document item No.3 had been given on leasehold right to deceased Parvathi Amma and her children alone and the same cannot devolve upon her grandchildren and therefore the said item had to be divided into 4 equal shares which will devolve upon Parvathi Amma's four children by name deceased Madhavan Nambiar, Ammukutty Amma, Kunhikannan Nambiar and Govindankutty Nambiar.

8. Defendant Nos.4 and 5 in their written statement admitted that plaint B schedule properties belong to the plaintiffs and the defendants except item No.6. According to defendant Nos.4and 5, item No.6 was purchased by Madhavan Nambiar which was later assigned to Parvathi Amma and her children as per the assignment deed dated 9.11.1942 (Ext.A3), that the said property was not purchased out of the income from item Nos.3 to 5 and it does not belong to the tavazhi. According to the said defendants, item Nos.1 and 2 belonged to the larger tavazhi of Lakshmi Amma, item No.6 is not liable to be partitioned among the plaintiffs and the defendants, but is to be partitioned among defendant

Nos.1 and 4 to 8 and the legal heirs of Ammukutty Amma and that item No.3 exclusively belongs to the four children of Parvathi Amma etc.

9. Defendant No.24 in the written statement supported defendants Nos.1 and 12 and pleaded that he adopts the written statement filed by defendants Nos.1 and 12. Defendant Nos.2, 3, 6 to 8, 25, 26 and 27 also filed written statements supporting either the plaintiffs or defendant Nos.1 and 12.

10. On the basis of the pleadings the court below framed seven issues, the evidence of Pw.1 and Dws.1 to 3 are recorded and marked Exts.A1 to A8 and B1 to B20.

11. The court below, after examining the evidence on record, entered findings on all the issues raised. The court below held that Exts.B1 registered kuzhikanom pattadaram executed by the Karanavan of Velluva Puthiyaveettil tarwad Sri Krishnan Nambiar in favour of the 1st defendant, a member of the tarwad, and Ext.B2 kuzhikanom marupattom deed are not valid and binding on the plaintiffs and other members of the tavazhi and the suit properties. The court also held that Ext.B3 order of the Land Tribunal in SM No.30/1983 and Ext.B5 purchase certificate issued by the Land Tribunal to the 1st defendant are also not valid and binding and will not disqualify the plaintiffs and other members of the tavazhi from claiming partition of the suit properties. The court below did not accept the contention of the plaintiffs that item No.6 was purchased out

of the income from item Nos.3 to 5 and the fund left by deceased Kannan Nambiar and, therefore, held that item No.6 is not liable to be partitioned among the members of the tavazhi of Parvathi Amma. It held that item No.6 in the plaint B schedule property is only liable to be partitioned among defendants Nos.1 and 4 to 8 and the legal representatives of Parvathi Amma. The claim of defendants 1, 12 and 25 that the rights of the plaintiffs, if any, over item Nos.1 and 2 is lost by adverse possession and limitation was negatived. The court further held that the plaintiffs have title and joint possession over items 1 to 5 in the plaint B schedule and plaintiffs Nos.1, 7, 8, 12, 15 and 18 have title and possession over item No.6 and that the properties are available for partition. On the basis of the findings as stated above, the court below passed a preliminary decree for partition in the following terms:

> That item Nos.1 and 2 in the plaint schedule properties be partitioned into 25 equal shares by metes and bounds of which the plaintiffs together entitled to 18/25 shares;
>
> Defendants Nos.1 to 3 will be entitled to one such share each, defendants Nos.4 and 5 together entitled to get one such share . defendants 6 to 8 together entitled to get one such share, defendants 9 to 15 together entitled to one such share and defendants 16 to 23 together entitled to one such share. The remaining defendants are not entitled to get any shares in items 1 and 2.

That item Nos.3 to 5 in the plaint schedule property be partitioned into 23 equal shares by metes and bounds of which the plaintiffs together entitled to get 18/23 shares, defendants 4 and 5 together entitled to one such share and defendants 6 to 8 together entitled to get one such share.

That item No.6 be partitioned into four equal shares by metes and bounds of which the 1st defendant is entitled to get one such share, defendants 4 and 5 together entitled to one such share, defendants 6 to 8 together will be entitled to get one such share and plaintiffs 1, 7, 8, 12, 15 and 18 and defendants 2 and 3 together entitled to get one such share.

The plaintiffs and other defendants are entitled to get share of mesne profits from the 1st defendant in respect of item No.1 and the quantum of the same will be decided in final decree proceedings. The quantum of mesne profits and the liability of paying the same in respect of item Nos.3 to 6 is left open and the same will be decided in the final decree proceedings.

12. The suit is one for partition of the plaint B schedule items 1 to 6. It is the common case of the parties that item Nos.4 and 5 in the plaint B schedule belongs to the tavazhi of the plaintiffs and the defendants and those items are available for partition. The dispute is only with respect to items 1, 2, 3 and 6 in the plaint B schedule. Defendants Nos.12 and 24 who are the appellants in the above appeal attacked the findings of the court below that items 1 and 2 are partible, the findings on the question of

adverse possession and ouster and also attacked the findings of the court below in respect of item 3 and claimed that the appellants are also entitled to a share in item No.3.

13. It is an admitted fact that items 1 and 2 were originally belonged to the tarwad of the plaintiffs and defendants 1 to 23 and that the plaintiffs and defendants 1 to 23 are the descendants of the common ancestress Velluva Puthiyaveettil Lakshmi Amma and items 1 and 2 in the plaint B schedule were allotted to the share of the aforesaid Lakshmi Amma and her descendants under Ext.A1 partition karar. It is the case of the plaintiffs that items 3 to 5 originally belonged to Palathikandoth Kannan Nambiar and he bequeathed the properties under Ext.A2 will in favour of Parvathi Amma and her children and that properties belong to the tavazhi of Parvathi Amma. The plaintiffs also pleaded that item No.6 was purchased under Ext.A3 assignment deed with the income from items 3 to 5 and therefore item No.6 property also partakes the character of tavazhi property. It is also the case of the plaintiffs that the 1st defendant is the Karanavan of the tavazhi, that he is residing in the house situated in item No.1 with his family members and that he is in possession and enjoyment of the properties for and on behalf of other members of the tarwad. The plaintiffs contended that items 1 and 2 are liable to be partitioned among the members of the larger tavazhi and items 3 to 6 among the members of the sub-tavazhi of Parvathi Amma. Defendants Nos.1, 12 and 24 opposed

the claim of the plaintiffs and other supporting defendants in items 1and 2. The 1st defendant claimed exclusive right and possession of items 1 and 2. According to him items 1 and 2 were orally leased by Krishnan Nambiar, the then Karanavan, in the year 1952 in his favour and subsequently Krishnan Nambiar executed Ext.B1 kuzhikanom pattadaram in his favour and on the same day he executed Ext.B2 marupat and ever since he is in exclusive possession and enjoyment of the properties on absolute right. According to him, on the strength of the oral lease and Ext.B1 kuzhikanom pattadaram he obtained Ext.B5 purchase certificate in respect of items 1 and 2. Since he is the absolute owner of the property by virtue of the aforesaid documents, he assigned some portion of the property in favour of his children.

14. The point argued before us by the learned counsel for the appellants is that the1st defendant has got absolute right over items 1 and 2 and, therefore, the said items are not partible. They attacked the findings and reasonings of the court below. None of the parties have disputed that items 1 and 2 belonged in jenm to Velluva Puthiyaveettil tarwad and the said items were enjoyed as tavazhi properties prior to the alleged oral entrustment in favour of the 1st defendant. It is also not disputed that the 1st defendant was the Karanavan of the tavazhi from 1968 and that he was the eldest male member. It has also come out in evidence that the executant of Ext.B1 kuzhikanam pattadaram late

Krishnan Nambiar is the father-in-law of the 1st defendant. The case set up by the1st defendant is that he obtained the oral lease in March 1952 from his father-in-law and that his father-in-law executed Ext.B1 kuzhikanam pattadaram in his favour, that he executed Ext.B2 marupat and subsequently obtained Ext.B5 purchase certificate on the basis of Ext.B1 kuzhikanam pattadaram. According to the respondents/plaintiffs the oral lease of 1952 set up by the 1st defendant is incorrect, that such a claim is set up to defeat the legitimate right of the plaintiffs and other co-owners of the property and that Ext.B1 and B2 documents are got fraudulently executed.

15. The question raised before the court below and now before us is whether the lease given by the then Karanavan under the alleged oral lease of 1952 and Ext.B1 are valid or not valid. According to the learned counsel for the plaintiffs the Karanavan has no right to alienate the property without the consent of the majority of the major members of the tarwad and that there is a prohibition under sec.33(1) of the Madras Marumakkathayam Act (22 of 1930) against the alienation of the property by way of sale, mortgage or lease. According to the learned counsel, the lease of tarwad property by the Karanavan shall not be valid unless the written consent of the majority of the major members of the tarwad has been obtained to the lease.

16. Sec.33 of the said Act deals with alienation of immovable

property by a Karanavan of a tarwad. The question to be decided is as to whether the Karanavan has got a right to lease the tarwad property in 1952 without obtaining the written consent of the majority of the major members of the tarwad. According to the 1st defendant, he got oral lease in 1952 and on 3.8.1960 Ext.B1 registered lease deed was executed by the then Karanavan. There is no evidence forthcoming as to the period of the lease originally granted and as to whether it exceeds 12 years or not. In the light of Ext.B1 lease deed executed after 8 years, it can be presumed that originally the lease was for a period not exceeding 12 years. Under sub-sec.(2) of sec.33 of the Act, as it stood at the time of the oral lease of 1952, no lease of any immovable property of a tarwad shall be valid unless it is executed by the Karanavan and where the Malabar Tenancy Act, 1929 confers fixity of tenure on the lessee, unless the written consent of the major members of the tarwad has been obtained to the lease, The alleged oral lease of 1952 will confer fixity of tenure under the Malabar Tenancy Act to a verumpattomdar provided the applicant should establish the oral lease of 1952. Sub-sec.(2) of sec.33(2) prohibits grant of any such lease which confers fixity of tenure on the lessee unless the alleged lease was given with the written consent of the major members of the tarwad.

17. Lease of tavazhi property by a Karanavan in favour of some members of the family in the year 1951 without the consent of the major members of the tavazhi was considered by a Division Bench of this Court

in *Kohnan Gopalan and others v. Padmini and others - ILR [1996 (3)] 770.* That was a case of lease executed on 29.1.1951 by the Karanavan in favour of some members of the tavazhi. Written consent of the majority of the members of the tavazhi was not obtained. The period of lease was for 12 years. The court held that in view of sub-sec.(2) of sec.33 of the Act, as amended in the year 1951, the consent of major members of the tavazhi or tarwad was required in view of the fact that the tenant thereunder would have been entitled to fixity of tenure under the Malabar Tenancy Act. The Division Bench held that any such lease executed after 27th July 1950 was hit by the amended sec.33(2) of the Act.

18. The appellants have no case that the oral entrustment as well as the entrustment under Exts.B1 and B2 documents are with the written consent of the majority of the major members of the tarwad. As DW.1 the 1st defendant deposed that his father-in-law, who was the Karanavan at that time, granted him oral lease in 1952 and executed Ext.B1 registered lease in 1960. He has no case that the original entrustment or subsequent Ext.B1 entrustment was with the consent of the majority of the major members of the tarwad.

19. Apart from the statutory bar as mentioned above under sec.33 (2) of the Madras Marumakkathayam Act, the further question is whether there is an entrustment by way of lease as alleged by the 1st defendant in his favour by the then Karanavan in the year 1952. There is no evidence

apart from the interested oral testimony of the 1st defendant as DW.1 to show that items 1 and 2 was entrusted to him by the then Karanavan. As DW.1, the1st defendant had deposed that he had paid purappad to the then Karanavan and obtained receipts in pursuance to the lease of 1951. He had also deposed that from 1960 to 1970 he had obtained receipts for the payment of purappad. But the 1st defendant failed to produce even a single receipt during the period 1952 to 1960 and from 1960 to 1970. The non-production of rent receipts or any other documents or circumstances evidencing the transaction also leads to the conclusion that the oral lease set up by the 1st defendant who is the son-in-law of the then Karanavan is not correct. Even after Ext.B1 lease deed came into existence, the 1st defendant is not in a position to produce even a single receipt evidencing payment of purappad. Even assuming that he got the property on lease under Ext.B1 lease deed, the said lease is also not a valid lease in view of sec.33(2) as it stood in 1960. The amendment was brought about in the year 1952 which provided that no lease at all could be granted by a Karanavan without the written consent of the majority of the members of the tarwad. Sec.33(1) as amended by Act 26/1958 reads as follows:-

> "33. xx xx xx xx
>
> (1) No sale or mortgage of any immovable property of a tarwad and no lease of any such property shall be valid, unless it is executed by the Karanavan for consideration, for tarwad necessity or benefit, and with the written consent of the majority of the major members of

the tarwad."

For a lease to be held valid under the said provision, the transaction shall be supported by consideration, tarwad necessity or benefit and shall be executed with the written consent of the majority of the major members of the tarwad. Since there is no evidence worthwhile to prove a valid lease which satisfies the requirements under sec.33(1) of the Madras Marumakkathayam Act as amended by Act 26/1958, the contention that he got absolute right over the property by virtue of Exts.B1 to B5 cannot stand. There is nothing wrong in the Karanavan executing a lease in favour of any member of the tarwad provided such transaction shall conform to the requirements of the statute then in force. The simple reason that the member happened to be the son-in-law of the Karanavan is not a factor to be taken note of for invalidating the lease. Any member of the tarwad, under a valid lease, can enjoy the property as a lessee if the family circumstances warrant grant of such lease for the best interest of the tarwad.

20. The learned counsel for the plaintiffs also challenged Ext.B3 order in SM 30/1983 and Ext.B5 purchase certificate issued pursuant thereto. In the proceedings before the Land Tribunal the 1st defendant impleaded the 2nd defendant in the suit as the opposite party. The 2nd defendant is a member of the tarwad and he has no authority to represent

the remaining tavazhi members. The proper party before the Land Tribunal should have been the tavazhi. There is no case for the1st defendant that the tavazhi members had ever taken any decision authorising the 2nd defendant to represent the tavazhi before the Land Tribunal. Ext.B3 order and Ext.B5 purchase certificate are obtained behind the back of the tavazhi and its members and have no binding force on the tavazhi or its members. In such circumstances the contention raised by the plaintiffs that Exts.B3 to B5 were fraudulently got executed in collusion with the 2nd defendant assumes importance. The very same contention as against Exts.B1 and B2 also had merit in the facts and circumstances proved. Since Exts.B1 to B5 documents are not legal and valid and are not binding on the plaintiffs or other members of the family and therefore in no way it disqualifies the plaintiffs and other members of the tavazhi from claiming partition of the suit properties.

21. Defendants Nos.1 and 12 in their written statement had further pleaded that item No.3 has lost its character as tavazhi property. According to them, as per Ext.A1 will, the said property has been given on leasehold right to deceased Parvathi Amma and her children alone and this was confirmed by document No.320/1929 which would also show that the lease was in favour of the specified members and could not devolve upon any of the descendants. On this ground the defendants are entitled to one share in item No.3. On the basis of the contention raised in the

appeal, document No.320/1929 was also examined by us and the merit of the contention on that basis also has to fail due to the following reasons:-

Going by the recitals in Ext.A1 and the document No.320/1929, item No.3 property was taken on lease by Sri Kannan Nambiar on 1.12.1905 from the jenmies. Kannan Nambiar is none other than the husband of Parvathi Amma and father of the four children named in the registered lease deed No.320/1929. Again Sri Kannan Nambiar took renewal of the said property on 28.1.1914. While so, Sri Kannan Nambiar by Ext.A2 will bequeathed item No.3 and other properties to Parvathi Amma and her children. In 1929 Sri Kannan Nambiar passed away. After his death document No.320/1929, which is a kuzhikanom pattadaram, was executed by the jenmi Karanavan in favour of Parvathi Amma and her four children. The lease in favour of the husband of Ammukutty Amma in the year 1905 and subsequent renewal of 1914 and the will dated 31.8.1924 (Ext.A2) are mentioned in document No.320/1929. The jenmi also admitted in the said document that pursuant to the will dated 31.8.1924 (Ext.A2), Parvathi Amma and her children are enjoying the property as lessees. Going by the recitals in document No.320/1929 it is clear that this document is executed in continuation of the earlier documents and can only be treated as a renewal of the lease in favour of the tavazhi consisting of Parvathi Amma and her descendants. The acquirers of lease constitute a natural group and form a tavazhi by themselves. There can

hardly be any doubt that the acquisition should be presumed to be on behalf of the tavazhi. It has been held in a number of decisions of this court that gift or acquisition made in favour of a marumakkathayi woman and her children, a natural presumption would arise that the acquisition is for the benefit of the tavazhi. Except producing this document, no evidence was let in on the side of the appellants to prove that item No.3 property was given on leasehold right to Parvathi Amma and her children alone, that the said lease was in favour of the specified members and therefore could not devolve upon any of the descendants. In fact, defendants Nos.1 and 12 admitted in their written statement that items 3 to 5 properties are partible and that they have no objection in partitioning the said items. While giving evidence as DW.1 also the 1st defendant categorically admitted that he has no objection in partitioning items 3 to 5 as tavazhi properties. Hence the contention of the appellants that the claim made by the plaintiffs in plaint item No.3 has to be characterised as tavazhi property tracing its origin to Ext.A2 will executed by Kannan Nambiar cannot be accepted, stands rejected.

22. The trial court rejected the contention of the plaintiffs that item No.6 was purchased with the income from item Nos.3 to 5 and the fund left by deceased Kannan Nambiar and therefore item No.6 is also liable to be partitioned among the members of the tavazhi of Parvathi Amma. The trial court upheld the contention of defendants 4 and 5 that the said item of

property is liable to be partitioned among defendants 1 and 4 to 8 and the children of Parvathi Amma. The trial court after accepting the contentions of defendants 4 and 5 held that item No.6 be partitioned into four equal shares by metes and bounds of which the 1st defendant is entitled to get one such share, defendants 4 and 5 together entitled to one such share as the legal representatives of Madhavan Nambiar, defendants 6 to 8 will be entitled to get one such share as the legal representatives of Govindankutty and plaintiffs 1, 7, 8, 12, 15 and 18 and defendants 2 and 3 together entitled to get one share as the legal representatives of Ammukutty Amma.

23. The plaintiffs and defendant No.3 who are respondents 1 to 18 and 21 in the appeal filed cross-objection challenging the said finding. According to the cross-objectors, the finding that item No.6 is liable to be partitioned only among defendants 1 and 4 to 8 and the legal representatives of Parvathi Amma is unsustainable. They have contended before us that item No.6 was purchased with the funds left by deceased Kannan Nambiar and retained with Parvathi Amma and also with the income from item Nos.3 to 5 possessed by Parvathi Amma. Item No.6 was purchased by Parvathi Amma and her children by Ext.A3 document dated 9.11.1942. Under what circumstances and in what manner the consideration for Ext.A3 was raised is not known. There is no direct evidence to prove that item No.6 was purchased out of the income from

item Nos.3 to 5 or with any fund left by deceased Kannan Nambiar. One thing is very clear that the acquisition is made in favour of a marumakkathayi woman and her children who constitutes a natural group. It is also borne out from evidence that Parvathi Amma was in possession and enjoyment of properties bequeathed to the tavazhi under Ext.A2 will dated 31.8.1924 by her husband. Her husband died in the year 1929 and in 1929 she came into possession of the properties covered by Ext.A2 will. While she was in management of the said properties, item No.6 was acquired on 9.11.1942 by Ext.A3 assignment deed. There is also no evidence that Parvathi Amma had her own funds other than the income from the tarwad properties. It has also come out in evidence that the tarwad was receiving purappad from several tenants. The evidence on hand will go to show that the above mentioned amounts at her hands was the income she received from the tarwad properties and there is every possibility that those amounts have been utilised for the acquisition of item No.6 property, especially when the acquisition was for a small amount of Rs.380/-. Such a possibility cannot be ruled out. At the same time, since positive evidence is lacking regarding the consideration paid for item No.6 in Ext.A3 assignment deed, we concur with the reasons stated by the trial court that there is no evidence to show that the income from item Nos.3 to 5 and the fund left by deceased Kannan Nambiar was utilized for purchase of item No.6.

24. At the same time, a natural presumption would arise when a gift or acquisition is made in favour of a marumakkathayi woman and all her children that the acquisition is for the benefit of the tavazhi. The principle of law in such circumstances is that once it is found that the acquirers constitute a natural group and form a thavazhi by themselves, there can hardly be any doubt that the acquisition should be presumed to be on behalf of the thavazhi. There is no evidence in this case to rebut the presumption. There cannot be any dispute that an acquisition by the joint exertion of persons constituting a thavazhi will enure to the benefit of the thavazhi and the property so acquired is thavazhi property. We find support for the above said principle from the decision reported in *Kayakkal Lakshmi and others v. Kayakkal Anandan and others - ILR 1982 (2) Ker. 377* wherein the same position was examined and held so.

25. The appellants also contended that the right of the plaintiffs over items Nos.1 and 2 is lost by adverse possession and limitation. It is well settled that if a co-owner in possession held adversely to other co-owners openly and for a substantially long period of time, ouster of other co-owners may be inferred. A co-owner who is in possession is to prove adverse possession by positive evidence. Mutation of name in the revenue records or effecting repairs or even building a house cannot constitute ouster. There must be evidence of open assertion of hostile title coupled with exclusive possession and

enjoyment by one of them to the knowledge of others may justify a claim for adverse possession. In this case there is no such evidence adduced by the appellants before the court below. Under the circumstances the finding of the court below that the title of the plaintiffs over items Nos.1 and 2 is not lost by adverse possession and limitation requires no interference and therefore confirmed.

26. In the circumstances the cross-objection filed by the cross-objectors is allowed and we hold that item No.6 in the plaint schedule property also is to be partitioned along with item Nos.3 to 5 into 23 equal shares by metes and bounds of which the plaintiffs together will be entitled to get 18/23 such shares, defendants 1 to 3 will be entitled to one such share each, defendants 4 and 5 together will be entitled to one such share and defendants 6 to 8 together will be entitled to get one such share.

In the result, A.S.No.576 of 1992 is dismissed. The cross-objection filed by the cross-objectors stands allowed and the judgment and decree passed by the court below stand modified as stated above. No order as to costs.

KURIAN JOSEPH, JUDGE

HARUN-UL-RASHID, JUDGE

mt/-

C.R.

KURIAN JOSEPH &
HARUN-UL-RASHID, JJ.

A.S. No.576/1992 and
Cross-objections

JUDGMENT

24.10.2007